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D.F., Appellant)	
)	
and)	Docket No. 18-1227
)	Issued: December 21, 2018
DEPARTMENT OF THE NAVY, MARINE)	
CORPS AIR STATION, CAMP LEJEUNE,)	
Cherry Point, NC, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On May 31, 2018 appellant filed a timely appeal from a January 22, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP) and a March 27, 2018 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant has met his burden of proof to establish a back injury in the performance of duty on September 19, 2017, as alleged; and (2) whether OWCP properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 25, 2017 appellant, then a 43-year-old firefighter/paramedic, filed a traumatic injury claim (Form CA-1) alleging that on September 19, 2017 he sustained a herniated disc while in the performance of duty. He asserted that he awoke on September 19, 2017 in the dorm room of the fire station with a sore back. Appellant related, "I had performed mandatory physical training the day before. I stood up out of bed and attempted a toe touch stretch. While bending over to touch my toes I felt a pop in my back and felt a shooting nerve pain run down my leg." He related that he sought treatment at the emergency room and received a diagnosis of a herniated disc. Appellant stopped work on September 19, 2017. The employing establishment did not controvert the claim.

In an undated witness statement, S.V., a coworker, related that he saw appellant limping the morning of September 19, 2017. Appellant told him that he had hurt his back after waking up that morning.

Appellant was evaluated at the emergency department on September 20, 2017 for low back pain.

In a September 26, 2017 report, Dr. Alan Schleier, an osteopath and Board-certified physiatrist, obtained a history of appellant hearing a pop in his back and experiencing pain that extended from appellant's back into his right leg doing a physical training session at work.² The symptoms began when he performed an exercise that required forward flexion of the spine with left rotation. Dr. Schleier diagnosed acute lumbar radiculopathy on the right side due to "an injury at work involving mandatory physical training."

In a September 29, 2017 statement, P.R., a coworker, advised that on the morning of September 19, 2017 he found appellant lying on the ground. Appellant told him that he was stretching to alleviate his back pain. P.R. asked appellant if the injury occurred as a result of the physical training and appellant responded that he was "not sure."

Dr. Schleier, in an October 18, 2017 progress report, advised that a magnetic resonance imaging (MRI) scan study revealed an L4-5 disc protrusion impacting the L4 nerve root consistent with appellant's symptoms. He recommended pain management.

On October 18, 2017 Dr. Matthew J. Swiber, a Board-certified anesthesiologist, discussed appellant's history of pain in his back and right lower extremity after a September 19, 2017 employment injury. He indicated that the incident occurred during "high intensity physical training. [Appellant] was performing a stretch, touching his toes. He felt a pop in his lower back." The pain increased that day into the following night and appellant sought treatment in the emergency department. Dr. Swiber noted that an October 5, 2017 MRI scan study showed a disc protrusion at L4-5 contacting the L4 nerve root.

² On September 26, 2017 Dr. John R. Spellman, who specializes in sports medicine, advised that appellant could resume work on that date with restrictions.

OWCP, in a December 6, 2017 development letter, notified appellant that it had paid a limited amount of medical expenses as his injury appeared minor and was uncontroverted. It advised that it was now formally adjudicating his traumatic injury claim. OWCP requested that appellant provide additional factual and medical evidence, including a detailed statement explaining how the injury occurred and a reasoned medical report addressing the causal relationship between any diagnosed condition and the identified work incident.

In a January 6, 2018 response, appellant related that he was on a 48-hour work shift when he awoke in his dorm room with back pain. He noted that he often experienced back pain after sleeping on the beds at work. On September 19, 2017 appellant was sore from high intensity physical training. When he tried to stretch his back he felt something pop and experienced shooting pain and the inability to move his right foot. Appellant returned home, but his pain increased and he sought medical treatment.

By decision dated January 22, 2018, OWCP denied appellant's traumatic injury claim. It found that he had not established that the event occurred as alleged, noting that the medical evidence indicated that his pain began while he was performing physical training.

On February 28, 2018 appellant requested reconsideration. He submitted a February 12, 2018 report from Dr. Schleier. Dr. Schleier indicated that he had treated appellant for lumbar radiculopathy on the right side beginning September 26, 2017. The symptoms began when appellant woke up in the morning after physical training the prior day. Dr. Schleier diagnosed L4 radiculopathy on the right. He related, "It is my opinion that [appellant's] current condition is directly related to the physical training he participated in on the job as part of his job requirements. This is evidenced by the lack of similar prior symptoms and the chronological onset of symptoms in relat[ion] to appellant's physical training."

By decision dated March 27, 2018, OWCP denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). It found that he had not raised an argument or submitted relevant new evidence sufficient to warrant reopening his case for further merit review. OWCP noted that Dr. Schleier's report did not address the relevant issue of whether he had factually established the occurrence of the September 19, 2017 employment incident.

On appeal appellant notes that OWCP denied his claim because his history of injury varied with that on the medical reports. He relates that his injury occurred when he tried to touch his toes after getting up. Appellant asserts that his physicians found that his injury occurred after physical training and notes that he has submitted a medical report clarifying the history of injury and causation.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any

³ *Supra* note 1.

disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁶ Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁷

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁸ An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁹ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision. Appellant alleged that he sustained a herniated disc when he tried to stretch out his back on the morning of September 19, 2017. He indicated that his back hurt when he woke up and that he had undergone intense physical training, which included forward flexion of the lumbar spine, at work the previous day. Appellant was on 48-hour duty, staying in the dorm of the fire station, at the time of the alleged incident. OWCP denied his claim as it found that he had not established that the September 19, 2017 employment incident occurred, as alleged.

⁴ See *E.B.*, Docket No. 17-0164 (issued June 14, 2018); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁵ See *P.S.*, Docket No. 17-0939 (issued June 15, 2018); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ See *V.J.*, Docket No. 18-0452 (issued July 3, 2018); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ *Id.*

⁸ See *M.T.*, Docket No. 17-1934 (issued September 19, 2018).

⁹ See *M.J.*, Docket No. 17-1810 (issued August 3, 2018).

¹⁰ See *L.B.*, Docket No. 17-2023 (issued August 21, 2018).

¹¹ See *D.B.*, Docket No. 18-0537 (issued September 12, 2018).

The Board finds that the evidence does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the occurrence of the employment incident. Appellant has consistently described the evidence as occurring when he tried to stretch out his sore back on the morning of September 19, 2017, the day after vigorous physical training and while being on 48-hour duty. He bent over to try to touch his toes and felt a pop and shooting pain in his back.

As noted, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.¹² While the medical reports contain a history of appellant experiencing back pain while performing physical training instead of after stretching the following morning, the Board finds that, under the circumstances of this case, his allegations of sustaining back pain due to bending to touch his toes have not been refuted by strong or persuasive evidence and there are no inconsistencies sufficient to cast serious doubt on his version of the employment incident.¹³ The employing establishment did not controvert the claim and he sought medical treatment on September 20, 2017 the day after the alleged work incident.¹⁴

OWCP denied appellant's claim as he had not established the occurrence of an employment incident on September 19, 2017 and thus did not consider the medical evidence. The case will be remanded for OWCP to evaluate the medical evidence and determine whether he sustained a medical condition or disability due to the accepted September 19, 2017 employment incident.¹⁵ After such development as it deems necessary, it shall issue a *de novo* decision.¹⁶

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² See *supra* note 8.

¹³ See *C.V.*, Docket No. 15-0615 (issued September 13, 2016).

¹⁴ The Board notes, however, that a medical report based on an inaccurate history of injury is of diminished probative value. See *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

¹⁵ See *supra* note 11.

¹⁶ In light of the Board's disposition of the merits of the case, the issue of whether OWCP properly denied appellant's request for reconsideration of the merits of his case under section 8128(a) is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 27 and January 22, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 21, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board